रजिस्ट्री सं० डी एल (एन) 04/0007/2003—05 REGD. No. DL (N) 04/0007/2003—05

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सं. 27] नई दिल्ली, दिसम्बर 21—दिसम्बर 27, 2003, शनिवार/अग्रहायण 30—पौष 6, 1925
No. 27] NEW DELHI, DECEMBER 21—DECEMBER 27, 2003, SATURDAY/AGRAHAYANA 30—PAUSA 6, 1925

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके
Separate Paging is given to this Part in order that it may be filed as a separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii)
PART II—Section 3—Sub-section (iii)

केन्द्रीय अधिकारियों (संघ राज्य क्षेत्र प्रशासनों को छोड़कर) द्वारा जारी किये गये आदेश और अधिसूचनाएं
Orders and Notifications issued by Central Authorities (other than the Administrations of Union Territories)

भारत निर्वाचन आयोग

नई दिल्ली, 5 दिसम्बर, 2003

आ. अ. 64.—लोक प्रतिनिधित्व अधिनियम, 1950 (1950 का 43) की धारा 13कक की उप-धारा (1) में निहित उपबन्धों के अनुसरण में तथा इस आयोग की तारीख 30 जून, 1993 की अधिसूचना सं. 508/बिहार/92 का अधिक्रमण करते हुए, निर्वाचन आयोग, झारखण्ड सरकार के परामर्श से, नीचे की सारणी स्तम्भ (3) में विनिर्दिष्ट राज्य सरकार के अधिकारी को उक्त सारणी के स्तम्भ (2) में विनिर्दिष्ट झारखण्ड राज्य में जिले के जिला निर्वाचन अधिकारी के रूप में पदाभिहित करता है :—

सारणी

सं.	जिले का नाम	जिला निर्वाचन अधिकारी
1	2	3
1.	साहेबगंज	उपायुक्त, साहेबगंज
2.	पाकुड	उपायुक्त, पाकुड
3.	दुमका	उपायुक्त, दुमका
4.	जामताड़ा	उपायुक्त, जामताड़ा
5.	देवधर	उपायुक्त, देवधर

1	2	3
6.	गोड्डा	उपायुक्त, गोड्डा
7.	कोडरमा	उपायुक्त, कोडरमा
8.	हजारीबाग	उपायुक्त, हजारीबाग
9.	चतरा	उपायुक्त, चतरा
10.	गिरिडीह	उपायुक्त, गिरिडीह
11.	बोकारो	उपायुक्त, बोकारो
12.	धनबाद	उपायुक्त, धनबाद
13.	पूर्वी सिंहभूम, जमशेदपुर	उपायुक्त, पूर्वी सिंहभूम-जमशेदपुर
14.	सरायकेला खरसावॉ	उपायुक्त, सरायकेला, खरसावॉ
15.	पश्चिम सिंहभूम, चाईबासा	उपायुक्त, पश्चिम सिंहभूम-चाईबासा
16.	रॉची	उपायुक्त, रॉची
17.	गुमला	उपायुक्त, गुमला
18.	सिमडेगा	उपायुक्त, सिमडेगा
19.	लोहरदग्गा	उपायुक्त, लोहरदग्गा
20.	लातेहार	उपायुक्त, लातेहार
21.	पलामू	उपायुक्त, पलामू
22.	गढ़वा	उपायुक्त, गढ़वा

[सं. 508/झार./2003]

आदेश से,

राजेश अग्रवाल, निदेशक-एवं-प्रधान सचिव

ELECTION COMMISSION OF INDIA

New Delhi, the 5th December, 2003

O.N. 64.—In pursuance of the provisions contained in sub-section (1) of section 13AA of the Representation of the People Act, 1950 (43 of 1950) and in supersession of its Notification No. 508/BR/92 dated 30th June, 1993 the Election Commission, in consultation with the Government of Jharkhand, hereby designates the Officer of Government specified in column (3) of the Table below as the District Election Officer of the District in the State of Jharkhand specified in column (2) of the Table below :—

TABLE

S.No.	Name of the District	District Election Officer
1	2	3
1.	Sahebganj	Deputy Commissioner, Sahebganj
2.	Pakur	Deputy Commissioner, Pakur
3.	Dumka	Deputy Commissioner, Dumka
4.	Jamtara	Deputy Commissioner, Jamtara
5.	Deoghar	Deputy Commissioner, Deoghar
6.	Godda	Deputy Commissioner, Godda
7.	Koderma	Deputy Commissioner, Koderma
8.	Hazaribagh	Deputy Commissioner, Hazaribagh
9.	Chatra	Deputy Commissioner, Chatra
10.	Giridih	Deputy Commissioner, Giridih
11.	Bokaro	Deputy Commissioner, Bokaro
12.	Dhanbad	Deputy Commissioner, Dhanbad

1	2	3
13.	East Singbum-Jamshedpur	Deputy Commissioner, East Singbum-Jamshedpur
14.	Saraikella, Kharsawan	Deputy Commissioner, Saraikella-Kharsawan
15.	Ranchi	Deputy Commissioner, Ranchi
16.	West Singhbhum-Chaibasa	Deputy Commissioner, West Singhbhum-Chaibasa
17.	Gumla	Deputy Commissioner, Gumla
18.	Simdega	Deputy Commissioner, Simdega
19.	Lohardaga	Deputy Commissioner, Lohardaga
20.	Latehar	Deputy Commissioner, Latehar
21.	Palamu	Deputy Commissioner, Palamu
22.	Garhwa	Deputy Commissioner, Garhwa

[No. 508/JKD/2003]

By Order,

RAJESH AGGARWAL, Director-cum-Principal Secy.

आदेश

नई दिल्ली, 8 दिसम्बर, 2003

आ. अ. 65.—जबकि, निर्वाचन आयोग का समाधान हो गया है कि नीचे की सारणी के स्तम्भ (2) में यथा विनिर्दिष्ट उत्तर प्रदेश राज्य से विधान सभा के उप निर्वाचन के लिए जो स्तम्भ (3) में विनिर्दिष्ट निर्वाचन क्षेत्र से हुआ है, स्तम्भ (4) में उसके सामने विनिर्दिष्ट निर्वाचन लड़ने वाला प्रत्येक अभ्यर्थी, लोक प्रतिनिधित्व अधिनियम, 1951 तथा तद्धीन बनाए गए नियमों द्वारा अपेक्षित उक्त सारणी के स्तम्भ (5) में यथा दर्शित अपने निर्वाचन व्ययों का लेखा दाखिल करने में असफल रहा है;

और जबकि, उक्त अभ्यर्थियों ने सम्यक् सूचना दिए जाने पर भी उक्त असफलता के लिए या तो कोई कारण अथवा स्पष्टीकरण नहीं दिया है या उनके द्वारा दिए गए अभ्यावेदनों पर यदि कोई हो, विचार करने के पश्चात् निर्वाचन आयोग का यह समाधान हो गया है कि उनके पास उक्त असफलता के लिए कोई पर्याप्त कारण या न्यायौचित्य नहीं है;

अतः, अब, निर्वाचन आयोग एतद्द्वारा उक्त अधिनियम की धारा 10-क के अनुसरण में नीचे की सारणी के स्तम्भ (4) में विनिर्दिष्ट व्यक्तियों को संसद के किसी भी सदन के या किसी राज्य/संघ राज्य क्षेत्र की विधान सभा अथवा विधान परिषद् के सदस्य चुने जाने और होने के लिए इस आदेश की तारीख से तीन वर्ष की कालावधि के लिए निरर्हित घोषित करता है।

सारणी

क्रम सं.	निर्वाचन क्षेत्र का विवरण	निर्वाचन क्षेत्र की क्रम संख्या और नाम	निर्वाचन लड़ने वाले अभ्यर्थी का नाम व पता	निरर्हता का कारण
1	2	3	4	5
1.	उत्तर प्रदेश राज्य से विधान सभा के लिए उप निर्वाचन, 2003	106-गौरीगंज	अली रजा, ग्राम-नयापुरवा निरालानगर, जिला-रायबरेली	निर्वाचन व्ययों का कोई भी लेखा दाखिल करने में असफल रहे।
2.	-वही-	-वही-	विजय पाल, ग्राम-झुण्डपुरा, सैक्टर-12, जनपद-गौतमबुद्ध नगर	-वही-

[सं. 76/उ.प्र.-वि.स./2002 (उप)]

आदेश से,

आनन्द कुमार, निदेशक (प्रशासन)-सह-प्रधान सचिव

ORDER

New Delhi the 8th December, 2003

O. N. 65.—Whereas, the Election Commission is satisfied that each of the contesting candidates specified in column (4) of the table below at the Bye-Elections to the Legislative Assembly in the State of Uttar Pradesh as specified in column (2) held from the Constitutency specified in column (3) against his name has failed to lodge the account of his election expenses as required by the Representation of the People Act, 1951 and the rules made thereunder as shown in column (5) of the said table;

And, whereas, the said candidates have either not furnished any reason or explanation for the said failure even after due notices and/or the Election Commission, after considering the representation made by them, if any is satisfied that they have no good reason or justification for the said failure;

Now, therefore, in pursuance of Section 10A of the said Act, the Election Commission hereby declares the persons specified in column (4) of the table below to be disqualified for being chosen as, and for being a member of either House of the Parliament or of the Legislative Assembly or Legislative Council of a State/Union Territory for a period of three years from the date of this order :—

TABLE

Sl. No.	Particular of Election	Sl. No. & Name of Constituency	Name & Address of Contesting Candidates	Reason of Disqualification
1	2	3	4	5
1.	Bye-Election to the Legislative Assembly of the State of Uttar Pradesh, 2003	106-Gauriganj	Ali Raja, Vill.-Nayapurva Nirala Nagar, Distt.-Rai Bareli	Failed to lodge any account of his/her election expenses
2.	-do-	-do-	Vijai Pal, Vill.-Jhundpura, Sector-12, Distt.-Gautam Buddha Nagar	-do-

[No. 76/UP-LA/2002 (Byc)]

By Order,

ANAND KUMAR, Director (Admn.)-cum-Principal Secy.

नई दिल्ली, 16 दिसम्बर, 2003

आ. अ. 66.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, भारत निर्वाचन आयोग 1999 की निर्वाचन अर्जी संख्या 29 में, कर्नाटक उच्च न्यायालय, बंगलौर का निर्णय तारीख 16 जून, 2000 को इसके द्वारा यहां प्रकाशित करता है।

(निर्णय इस अधिसूचना के अंग्रेजी भाग में छपा है।)

[सं. 82/कर्नाटक-लो.स./29/99/2001]

आदेश से, तपस कुमार, सचिव

New Delhi the 16th December, 2003

O. N. 66.—In pursuance of Section 106 of the Representation of the People Act, 1951, (43 of 1951) the Election Commission hereby publishes the order of the High Court of Karnataka, Bangalore, dated the 16th June, 2000 in Election Petition No. 29 of 1999.

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 16TH DAY OF JUNE 2000

BEFORE

THE HON'BLE MR. JUSTICE V. P. MOHAN KUMAR

ELECTION PETITION NO. 29/1999

BETWEEN:

Michael B Feranades,
No. 5, Myrtle Lane,
Bangalore-560025. ....Petitioner

(By Smt. Pramila Nesargi, Ms. Geeta Menon & Sri. S. Balaji, Advs.,)

AND

1. C.K. Jaffer Sharief,
S/o. Late C. Abdul Kareem,
Major, No. 46,
Haines Road,
Bangalore-560005

2. C. Narayanaswamy,
S/o. Shankarappa,
Major. No. 196,
2nd Main Road,
K.E.B. Colony,
Goddalahalli,
Bangalore-560094

3. M. Sundaramurthy,
S/o. C. Masilamani,
Major, No. 29,
12th Cross.
Vyalikaval,
Bangalore-560003

4. K. N. Parameshappa,
S/o. Narayanappa,
Major. No. 10,
"Thaneya Naralu"
Street, H.A. Farm Post,
Hebbal Kempapura,
Bangalore-560024

5. Meer Layaq Hussain,
S/o. M. M. Hassan,
Major. Dr. B.R. Ambedkar Medical
College Men's Hostel,
Room No. 216,
Shampur Road,
Arabic College Post,
K.G. Halli,
Bangalore-560045

6. The Election Commission
Represented by its,
Chief Election Commissioner,
Nirvachan Bhavan,
New Delhi

7. Shri Mohammed Sanaulla,
Returning Officer and
Deputy Commissioner
No. 12, Bangalore North
Parliamentary Constituency,
Bangalore District,
Bangalore

8. Chief Electoral Officer,
State ofKarnataka,
Cubbon Park,
Bangalore-560001 ....Respondents

(By Sri. Venkateswar N.K., H.D. Amarnathan &
Smt. Madhumita Bagchi for R-1,
Sri N. Sonnegowda for R-2,
R-3, 4 & 5 service completed V/o dt : 6-6-2000
Sri. Krishna S. Dixit for R-6,
Govt. Adv. for R-7 & R-8)

Whereas an Election Petition filed U/s. 81 of the Representation of People Act, 1951, by the above named Petitioner-Candidate at 1999 General Election to the House of Parliament from No. 12, Bangalore North Parliamentary Constituency held on 11-9-1999, praying to :

(a) Declare that the declaration of result of Respondent No. 1 from No. 12 Bangalore North Parliamentary Constituency as null and void.

(b) Direct repoll of the No. 12, Bangalore North Parliamentary Constituency.

(c) Declare that the Section 61(a) of the Representation of Peoples Act and consequent rules under chapter 2 of the Conduct of Election Rules, 1961 as un-constitutional.

(d) Declare that the elections under Electronic Voting Machine held in No. 12, Bangalore North Parliamentary Constituency as null and void.

(e) Award costs of the petition to the petitioner.

(f) Grant such other reliefs as this Hon'ble Court deems fit under the facts and circumstances, of the case.

has been registered by this Court.

I.A.I for deleting the Respondent No. 6, filed by the Advocate for Respondent No. 6, I. As. II and III for deleting the Respondent Nos. 7 and 8, filed by the Govt. Advocate.

After hearing, the Court made the following :

ORDER

VPMKJ : E.P. No. 29/1999
16-6-2000

ORDER ON I.As. I, II AND III

These applications have been filed by the respondents 6, 7 and 8 to delete them from the Party array. The main dispute is with respect to the election to the Bangalore North Parliamentary constituency which has been held using Electronic Voting Machine (E V M). The contention raised is that the usage of this machine, has adversely prejudiced the claim of the petitioner to win at the Election. I.A. I has been filed by the 6th respondent; I.A. II has been filed by the 7th respondent and I.A. III has been filed by the 8th respondent. These applications have made relying on the provisions of Section 82 of the Representation of People Act, 1951 (hereinafter referred to as the 'Act'). Section 82 reads as follows :

"82. Parties of the petition—A Petitioner shall join as respondents to his petition—

(a) where the petitioner, in addition to claiming declartion that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

A reading of Section 82 makes it clear that the necessary Parties to the proceedings Election Petition shall

be only the candidates who have contested at the elections. As to who is a "candidate" has been defined at Section79(b) of the act, to mean "a person who has been or claims to have been duly nominated as a candidate at any election." Therefore, it is urged that read with Section 80 of the Act, these respondents namely 6, 7 and 8 are not necessary or proper parties to the proceedings. As such they be deleted from party array.

2. The main contention urged by the respondents is that the persons who seek themselves to be deleted from the party array were not the candidates at the elections and as such they should not be made parties to the proceedings.

3. The answer to the investigation has to be under taken, keeping in mind the following observations of the Supreme Court in N.P. Ponnuswami Vs. Returning Officer Namakkal (AIR 1952 SO64). Therein Justice Fazal Ali speaking for the Bench stated thus :

"18. The points which emerged from this decision may be stated as follows :

(i) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitation imposed by it. (ii) Strictly speaking , it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal and entirely new one unknown jurisdiction, that special jurisdiction should be exercised in accordance with law which creates it."

(Underlining supplied for emphasis)

Again, the said aspect was further elaborated in Jyothi Basu Vs. Debi Ghosal AIR 1982 SC 983. It was stated thus:

"8. A right to elect, fundmental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statue, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, no right to dispute and therefore, subject to statutory limitation. An election petition is not an action at Common Law nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election law unless statutory embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trail of election disputes, is what the statute lays down.In the trial of election disputes, court is put in a straight jacket. Thus, the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any concerning the election is regulated by the Representation of the People Act 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any right claimed in relation to an election or an election dispute. We are concerned with an election dispute the question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the 4 corners of the statute. What does the Act say?"

This in fact reiterates what the Supreme Court declared earlier in Jagan Nath Vs. Jaswant singh AIR 1954 SC 210. Here Chief Justice Mahajan presiding over the five member Bench stated thus :

"7. The general rule is well-settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well-settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interferred with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however has any application if the special law itself confers authority on a Tribunal to proceed with a petition in accordance with certain procedure and when it does not state the consequences of non-compliance with certain procedural requirements laid down by it."

4. In the decision reported in 1982 SC 983, the question that arose was as to whether the party impleaded therein was necessary to the proceedings or not. Alleging that there are no allegation against them and that their election is not sought to be invalidated, they applied to remove them party array. Admitedly, there was no

allegation in the Election petition whatever against the person who sought themselves to be removed from the party array. After considering respective contentions, the Supreme Court observe that the parties to be impleaded in a procedings with respect to election need be only those persons who are indicated in the special procedure indicated in the statute,- namely Section 82 of the Act. The question of necessary parties or proper parties do not arise for consideration in an Election Petition. They held as under :

> "10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the Court 'effectually and completely to adjudicate upon and settle all questions involved' may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only 'as far as may be' and subject to the provisions of 1951 and the rules made thercunder. Section 87(1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked."

To come to the conclusion their Lordships placed reliance on the earlier judgement of the Supreme Court referred to supra i.e. AIR 1954 SC 210 (Vide para 7 of the judgment).

5. The question that arosc for consideration in AIR 1982 SC 983, was whether a person other than a candidate referred to in Section 82 be impleaded in the Election Petition. As a matter of fact, it had been averred in the Election Petition that the parties who sought themselves for removal had colluded and conspired with the successful candidate to commit various alleged corrupt practises. It was urged that if they are not on party array, these allegations cannot be gone in to effectively. That question was also considered as to what should happen if those pleas are to be established. Their Lordships considered the issues and observed as under :

> "Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Section 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition."

These pronouncements of the Supreme Court according to learned Counsel Mr. Krishna Dixit and Mr. Sundar Kumar, appearing for these respondents who are the applicants in I.A. I to III concludes the issue. The same view has been expressed by the Supreme Court in the subsequent judgment namely 1991(2) Supp. SCC. 624.

6. Confronted with the situation, Mrs. Pramila Nesargi, learned Counsel for the Election Petitioner placed reliance on the decision of Supreme Court in JAGANNATH vs. JASWANTH SINGH & OTHERS, (1954 SC 210), wherein the Supreme Court had an occassion to consider, according to her, a similar question and had examined the question as to who are all the necessary proper parties who can be impleaded in an Election Petition. Their Lordships according to her has taken a view that an Election Petition is like a suit for redemption of mortgage and that the principles of Order 34 of CPC Code could be applied to these cases also. As such she contents that all persons interested in the proceedings can be made party. In fact this case is a converse case. A candidate who should have been impleaded in the light of Section 82 of the Act as it stood then was not made party to the proceeding. An application was made to implead the said candidates. The Election Tribunal found that the said person though not a necessary party but was a proper party. He was therefore impleaded invoking powers under Order 1 Rule 9 CPC. The validity of the order came up for consideration in the appeal ultimately before the Supreme Court and this was the question that the Supreme Court had to consider. While upholding the impleadment, their Lordships stated thus:

> "12. Provision has been made in S. 90(1) for any other candidate subject to the provisions of S. 119, to have himself impleaded as a party in the case within a prescribed period. This provision indicates that the array of parties as provided by S. 82 is not final and conclusive and that defects can be cured. Provisions of Ss. 110, 115 and 116 of Chapter IV of the Part also support this view. Section 110 provides the procedure for the withdrawal of a petition. It says that any person who might himself have been a party may within 14 days of publication of the notice of withdrawal in the official gazette apply to be substituted as a petitioner in the place of the party withdrawing it.
>
> Section 115 provides that such a person can be substituted as a petitioner on the death of the original petitioner while S. 116 provides that if a sole respondent dies or gives notice that he does not wish to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is appearing in the petition, the tribunal shall cause notice of such event to be pubished in the official gazette and thereupon any person who might have been a petitioner may within 14 days of such publication apply to be substituted in the place of such respondent and oppose the petition and shall be entitled to

continue the proceedings on such terms as the tribunal may think fit. These provisions suggest that if any proper party is omitted from the lists of respondents, such a defect is not fatal and the tribunal is entitled to deal with it under the provisions of the Code of Civil Procedure, Order I. Rules 9, 10 and 13."

I am of the view that the principle laid down in AIR 1954 SC 210 only reinforces the reasoning in AIR 1982 SCC 983. The decision in 1954 SC 210 was considering the power of the Election Tribunal to impleaded the additional respondents if it feels that they were necessary/proper parties. That does not any way conflict the provisions of Section 82. To say that there is power for Tribunal to implead any person who may come within the ambit of Section 99 or Section 110 or 112 etc., does not necessarily mean that, everyone however unnecessary to the proceedings may be impleaded as a party. Election Petition as can be seen from the discussions extracted above is a special proceedings controlled by the special statute. The rights conferred are not Common law right nor is a fundamental right. It is a right created under the statute. That statute itself can control its procedure. All that Section 87(1) provide is that the Election Petition shall be tried by the High Court *as nearly as may be* in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. If that be so, the Court should look into the four corners of the statute to trace its powers and proceed in the matter. The decisions AIR 1954 SC 210 and AIR 1982 SC 983 proceed on the same footing and there is no conflict in the view expressed as sought to be made out. On the contrary, the decision AIR 1982 SC 983 draws its sustenance from the principles discussed in AIR 1954 SC 210.

7. Likewise, in a case before this Court reported in ILR 190 Kar Pg 2622, this Court also considered the question as to whether the Election Commissioner and Returning Officer are necessary parties to the Election Petition. His Lordship Justice Swamy, (as he then was) after adverting to the averments and pleading in the case held that in the light of the pleadings set out in the petition in the particular case the Election Commission and the Returning Officer were necessary parties to the proceedings. But after noticing the judgment of the Supreme Court in AIR 1982 SC 983, this judgment had not been approved by a later judgment of this Court reported in AIR 1996 KAR 167. In the light of the judgment of the Supreme Court in AIR 1982 SC 983, I prefer to follow the reasoning in AIR 1996 Kar 167.

8. Hence after hearing the respective sides and going through the judgment cited supra, I am of the view that the respondents-6, 7 and 8 are not necessary parties to the proceedings. The challenge in this petition relates to the election held and enquiry turns around the question as to whether there has been any prejudice caused by the use of the Electronic Voting Machine for the purpose of conducting the election. This is not a case of alleging any undue influence being wielded by the successful candidate or others or any official. There cannot be any allegation of undue influence as well. Learned counsel Ms. Pramila Nesargi, wanted to contend that the illegality averred in the petition attracts Section 100(1)(d)(iv) of the Act and as such the presence of Election Commissioner who took the decision under Section 61-A of the Act to use of the Electronic Voting Machine is necessary. But, to prove some of the grounds made mention in Section 100 and Section 101 of the Act, the presence of Returning Officer in the party array may also be insisted as necessary. But despite these provision Section 82(1)(a) was so worded, so that the parties to the proceedings were confined to 'candidates' as defined in Section 79(b) of the Act. The Legislature has in its wisdom done so. The Court cannot legislate but only interpret and in view of the interpretation given in AIR 1982 SC 983, I have to uphold the contention of the respodents 6 to 8. Therefore the rival argument does not appeal to the Court to hold that respondents 6, 7 and 8 are necessary parties to the present proceedings. In such circumstances, it is sufficient if only the candidates are made parties to the proceedings and it is for them to substantiate the contentions. It is not necessary that the Election Commissioner and the Returning Officer are made parties to proceedings. I allow the I.As. I direct that respondents-6, 7 and 8 be deleted from party array.

Issue copy of the order to both sides.

Sd/-Judge

[No. 82/KT-HP/29/99/2001]

By Order,

TAPAS KUMAR, Secy.

नई दिल्ली, 17 दिसम्बर, 2003

आ. अ. 67.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 116ग की उप-धारा 2(ख) के अनुसरण में, भारत निर्वाचन आयोग, सीविल याचिका सं. 2003 का 33 (मद्रास उच्च न्यायालय के निर्वाचन अर्जी सं. 2000 का 07) में, सर्वोच्च न्यायालय के तारीख 21 नवम्बर, 2003 के आदेश को एतद्द्वारा प्रकाशित करता है।

(निर्णय इस अधिसूचना के अंग्रेजी भाग में छपा है)

[सं. 82/त.ना.-लो.स./07/2000]

आदेश से,

तपस कुमार, सचिव

New Delhi the 17th December, 2003

O. N. 67.—In pursuance of Sub-section 2(b) of Section 116C of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the order of the Supreme Court of India dated 21st November, 2003 in Civil Appeal No. 33 of 2003 (High Court of Madras Election Petition No. 07 of 2000).

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 33 OF 2003

M. Chinnasamy ...Appellant

Vesus

K. C. Palanisamy & Ors. ...Respondents

Judgment

S.B. Sinha for himself and CJI :

To what extent an election tribunal should exercise its jurisdiction to direct inspection of the ballot papers and recounting of votes polled while determining an election petition in terms of the provisions of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act', for the sake of brevity) is in question in this appeal which arises out of a judgment and order dated 07-11-2002 passed by the High Court of Judicature at Madras in Election Petition No. 7 of 2000.

BACKGROUND FACTS :

An election took place for Karur Parliamentary Constituency (26) consisting of six assembly segments on 05-09-1999. Eleven candidates contested the said election. Total number of votes polled was 719705 and the appellant herein who is the returned candidate having the election symbol of 'two leaves' secured 334407 votes whereas Respondent No. 1 herein (the election petitioner) who contested the said election on the election symbol of 'rising sun' secured 331560 votes. The margin of votes between the returned candidate and the election petitioner was, thus, 2847.

It is also not in dispute that 16906 votes were rejected. The chief election agent of the election petitioner on or about 06-10-1999 lodged a complaint alleging irregularities in counting of votes. The said counting of votes took place on 6-10-1999 and the result thereof was declared at 5.10 A.M. on 7-10-1999.

The relevant portion of the said complaint reads thus :

> "Today (6-10-1999) during counting of the votes in all the Six Segments of Karur parliamentary constituency about 15.000 votes polled in Rising Sun Symbol of the Candidate K.C. Palanisamy has been rejected in violation of the Act and Rules without reason by the Assistant Returning Officers. The oral and written objections raised by the Agents were not accepted. So our candidate winning prospect was prevented.
>
> In Election each and every vote is important and even one vote difference decides the result. Therefore, I kindly request you to recount the rejected invalid votes and thereafter election result may be declared."

It is also not dispute that upon holding an inquiry in relation to the aforementioned complaint (Ex. P9), the returning officer who examined himself as CWI rejected the same holding :

> "...The Assistant Returning Officer who were incharge of the Counting of Ballot Papers in all the 6 Assembly Segments comprised in 26 Karur Parliamentary Constituency were enquired about the issue raised by the Objection Petitioner. All of them have reported that they have decided the rejected Ballot Papers only in the presence of the Counting Agents deputed by the contesting Candidates for this purpose, and the decisions were taken only in the presence of such counting Agents and with their concurrence. No one reised any objection to the decision taken by Assistant Returning Officers in the matter of rejection of Ballot Papers. In fact, all of them had appreciated the fairness in the rejection of Ballot Papers by the Assistant Returning Officers. The Assistant Returning officers have stated that no Objection Petition was presented to them at the time of Counting over the Rejection of Ballot Papers. Even the Poll Observers deputed by the Election Commission had been campaigning in the Counting Centres and no Objections were made to them over this issue. The Objections were analysed to find out whether they are substantiated. It is brought to my notice by the Assistant Returning Officers that most of the Ballot Papers were rejected on the ground "No Marking" and "Multiple Voting". The analysis of the votes polled and Votes rejected during the present Poll and the previous polls reveals that the total rejected votes during the previous poll was 25,292 as against the total valid votes of 6,49,880 whereas the Ballot Papers rejected in the present election is only 16,906 as against the total valid Votes of 7,19,705. I find no reason to Order Recounting of rejected Ballot Papers as requested by the Petitioner and accordingly his request is rejected."

The election petitioner thereafter filed the election petition before the High Court which was marked as Election Petition No. 7 of 2000. Besides raising a question of corrupt practice, allegations were also made as regards irregularities in counting of votes, which were divided in five different heads, namely :

Category 1 : Rejection of valid votes cast in favour of the petitioner by considering inadvertent thumb impression.

Category 2 : Rejection of valid votes on the basis of Polling Officer's rubber stamp impression found on ballot paper apart from voter's instrument mark.

Category 3 : Rejection of valid votes cast on border.

Category 4 : Rejection of valid votes on ground that wrong instrument used by voter.

Category 5 : Rejection of postal votes cast in favour of the petitioner.

Evidences were led to the effect that the number of votes which are alleged to have been illegally rejected in Category-1 : 750 votes; in Category-2 : 250 votes; in Category-3 : 1500 votes; in Category-4 : 5000 votes and in Category-5 : 300 votes.

The allegations made in the election petition were denied and disputed by the elected candidate. He further raised a plea that the allegations made in the said election petition as regard illegal rejection of votes suffered from vagueness. It was pointed out that no particulars had been disclosed in the election petition as to at which centre and at what time the alleged irregularities took place. The details of the tables at which the objections were raised had also not been disclosed. Even the names of the counting agents had not been mentioned in the election petition.

Such objections had been raised having regard to the fact that the Parliamentary Constituency consisted of six assembly segments and the counting was done at four different centres. It had further been contended that the election petition also does not disclose as to how and in what manner the provisions of sub-rules (3) and (4) of Rule 56 of the conduct of Election Rules, 1961 had been breached.

ISSUES:

On the pleadings of the parties, the High Court framed, inter alia, the following issues :

(1) Whether the petitioner has proved acts of serious irregularities in the manner of conduct of election and or in the counting of votes vitiating the entire election process as well as results?

(2) Whether the first respondent and/or his agents are guilty of corrupt electoral practices or electoral malpractice contemplated under Section 123 of the Representation of the People Act, 1951?

(4) Whether the petitioner is entitled to an order of scrutiny and recounting of the ballot papers in respect of No. 26, Karur Parliamentary Constituency as sought in prayer No. (i) of the Election Petition?

HIGH COURT JUDGMENT:

Issue No. 2 was decided against the election petitioner. The allegation as regard irregularity of counting of votes in relation to Category-4 aforementioned, had also not found favour with the High Court. The High Court, however, having regard to the evidences adduced on behalf of the election petitioner being PWs 1 to 7 held :

"...Having regard to the entire evidence, I am of the view that the petitioner had made out a prima facie case for re-count of the votes. The evidence of P.Ws. 1 to 7 clearly established the counting irregularities relating to category 1, namely, rejection of valid votes cast in favour of P.W. 1 by considering inadvertent thumb impression, Category II, rejection of valid votes on the basis of polling officer's rubber stamp impression found on the ballot papers apart from voter's instrument mark, category III-rejection of valid votes cast on the border and category V relating to rejection of postal votes which went in favour of the petitioner, Apart from that, as adverted to, the Returning Officer had failed to carry out the mandatory requirements provided under the Guidelines issued by the Election Commission. The objections given under Ex. P. 9 have not been properly considered and the alteration made in the date in Ex. P. 10 coupled with the evidence of P.W. 1 and also the delay in declaring the result of about 7 hours, would only lead to the irresistible conclusion that recount of the entire votes is a must to decide the intention of the electoral. Simply because under Ex. P/9 only a request was made for recount of the rejected votes, it cannot be made use of presently and prevent the recount of entire voters. In the case cited above, it is made clear that it is not necessary that there should be a request for recount and if the Returning Officer comes to know about the irregularities, it is his duty to order recount of the votes. Moreover, neither P.W. 1 nor his Chief Election Agent is qualified in law to expect that they would be able to give a petition for recount in accordance with law pointing out all irregularities one by one. When there is substantial compliance in the request under Ex. P/9 coupled with the irregularities highlighted and established by adducing positive evidence on the side of the 1st respondent, it is just and necessary that the entire ballot papers have to be inspected and recounted to pass further and appropriate orders in the case, Hence, these issues are answered accordingly."

SUBMISSIONS:

Mr. M.N. Rao, learned Senior Counel appearing on behalf of the appellant, inter alia, would submit that allegations made, in the election petition being general and vague in nature, the purported evidences on the basis whereof the impugned judgment has been passed were wholly inadmissible. The learned counsel would submit that a manifest error has been committed by the High Court in accepting the evidences of P.Ws 2 to 7 when neither particulars in relation to the alleged irregularities nor the names of the counting agents who examined themselves as PWs 2 to 7 had been mentioned in the election petition. In any event, the evidences adduced by PWs 1 to 7 could not have been accepted by the High Court as they failed and/or neglected to produce the notebooks in which they had allegedly been making notes which admittedly had been supplied to them as regard details of alleged irregularities in counting of votes. The learned counsel would contend that even no detailed particulars had been mentioned in the complaint filed by the chief election agent of the election petitioner marked as Ex. P/9. Mr. Rao would submit that while making an inquiry on the objections filed by the chief election agent of the election petitioner, it was not necessary for the returning officer to record oral evidence and in that view of the matter the High Court

committed an error in arriving at a finding that the objections under Ex. P/9 had not been properly considered. Mr. Rao would argue that in an election petition, the Tribunal cannot direct a roving or fishing inquiry and more so when only general and bald allegations were made. It was pointed out that whereas the High Court adopted the correct test in not directing recounting in relation to alleged irregularities in counting votes falling within Category-4, it failed to apply the same test in relation to other categories. In any event, contended the learned counsel, when the prayer in Ex. P/9 revolved round the 15000 rejected votes, all the votes could not have directed to be recounted.

Mr K.K. Mani, learned counsel appearing on behalf of the respondents, on the other hand, would submit that in an election petition, it is not necessary to disclose the particulars of material facts in terms of sub-section (1) of Section 83 of the Act. The learned counsel would contend that what is necessary to be stated is the material fact in a concise form as is required in terms of clause (a) of sub-section (1) of Section 83 of the Act and no particulars of such material facts are required to be pleaded as in the case of corrupt practice. According to the learned counsel, the chief election agent of the election petitioner having made serious allegations as regard irregularities in counting of votes in relation to all the six segments of the Parliamentary Constituency, the rule of pleadings would not require disclosure of the detailed particulars. The learned counsel would submit that as the High Court has passed the impugned judgment upon consideration of the evidences adduced by the parties, the same does not warrant any interference by this Court.

STATUTORY PROVISIONS:

Chapter II of Part VI of the said Act provides for the presentation of election petitions to the Election Tribunal. Section 80 provides that no election shall be called in question except by an election petition presented in accordance with the provisions of the said Part. The material part of Section 83 of the said Act reads as under :

"83. Contents of petition.—(1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies :

(b) shall set forth full particulars of any corrupt practies that the petitioner alleged including as full a statement as possible of the names of the parties alleged to have committed such corrupt practics and the date and place of the commission of each such practice;"

MATERIAL FACTS:

It is not in dispute that in relation to an election petition, the provisions of the Code of Civil Procedure apply. In terms of Order VI Rule 2 of the Code of Civil Procedure which is in part material with clause (a) of sub-section (1) of Section 83 an election petition must contain concise statement of material facts. It is true as contended by Mr. Mani that full particulars are required to be set forth in terms of clause (b) of sub-section (1) of Section 83 of the Act which relates to corrupt practice. The question as to what would constitute material facts would, however, depend upon the facts and circumstances of each case. It is trite that an order of recounting of votes can be passed when the following ingredients are satisfied : (1) If there is a prima facie case; (2) material facts therefor are pleaded; (3) the court shall not direct recounting by way of roving or fishing inquiry; and (4) such an objection had been taken recourse to.

The necessity of 'maintaining the secrecy of ballet papers' should be kept in view before a recounting is directed to be made. A direction for recounting shall not be issued only because the margin of votes between the returned candidate and the election petitioner is narrow.

The requirement of rule of pleadings containing material facts are salutary in nature.

The parties are bound by the said rule of pleadings and verification thereof having regard to the fact that an election may not be set aside on hyper-technical grounds although no factual foundation therefor had been laid in the pleadings as the elected candidate may not have any hand therein. So far as requirement of pleadings in a case where a direction of recounting of ballot papers has been prayed for, the court must proceed cautiously and with circumspection having regard to the requirement of maintaining secrecy of ballot papers. It is not disputed that the counting was done at four centres. It is further not disputed that the material facts, as regard as to which category of irregularities as enumerated in the election petition occurred, at which centre and at what time, had not been disclosed the details as regards tables at which such objections were raised, nor the names of the counting agents had been disclosed. The very basis of the election petition centres round the objections of the Chief Election Agent of the election petitioner dated 6-10-1999 (Ex. P/9). We have set out the said objections in extenso hereinbefore. A bare perusal thereof would clearly show that the allegations contained therein are absolutely vague and lack material particulars. Details as regard commission of alleged irregularities police stationwise, assembly segmentwise, polling counterwise or tablewise had not been disclosed. The same by itself goes to show that the Chief Election Agents of the election petitioner did not raise any objection before the returning officer and the counting staff as and when such irregularities purported to have been found out. It may be relevant to note that even if the said Agent of the election petitioner had not been examined, inter alia, on the ground that he after declaration of the election result has changed the sides.

It is also relevant to notice that no material has been brought on records to show that the factual findings of the Returning Officer as contained in his order dated 6-10-1999 are incorrect.

Furthermore, even PWs 2 to 7 in their evidences accepted that they had been supplied with notebooks wherein they allegdly noted such irregularities. Such notebooks had not been produced before the High Court and, thus, an adverse inference against the election petitioner ought to have been drawn. It appears from the records that the votes which had allegedly not been counted even according to PWs 1 to 7 would not cross five hundred marks. Although in Ex. P/9 it has been contended that "the oral and written objections raised by the agents were not accepted", but no such written objection was brought on record

In relation to the allegations contained in Paras 13 and 14 of the election petition regarding bundling of ballot papers and purported wrong transfer of valid votes polled in favour of Respondent No. 1, the High Court has disbelieved the evidence of PWs 2 to 7 on the ground that they could not give the details of the counting centres and other proper particulars, but accepted their evidence as regard alleged irregularities covered by Categories 1, 2, 3 and 5 for no valid or cogent reason.

The High Court while considering the objections raised in the election petition in relation to Category-4, inter alia, held such allegations cannot be considered as the same are based on general and vague allegations without any particulars, observing :

> " Even in the complaint given under Ex. P. 9 there is no whisper that wrong instrument has been used by any voter in particular booth of Constituency, which resulted in invalidating the votes..."

Despite the fact that in relation to the allegations made under Categories-1, 2, 3 and 5, similar general and vague allegations had been made, the High Court proceeded to accept the evidences of the said witnesses.

The High Court should not have accepted the evidence of PWs 2 to 7 when there are no particulars in the election petition and the names of counting agents had not even been mentioned in the pleadings.

The High Court furthermore applied a wrong legal test in passing the impugned judgment insofar as it proceeded to hold that the first respondent would not be prejudiced, if a recounting is ordered. The Test required to be applied for directing a recounting being well-settled, the High Court must be held to have misdirected itself in law. The question of prejudice of the election petitioner would not be a relevant factor keeping in view the constitutional and statutory scheme involving holding of an election and the consequences emanating from the direction of recounting which may lead to identification of voters as the same is not at all desirable.

In the instant case It was all the more necessary for the election petitioner to plead the material facts with certain precisions having regard to Ex. P/9 in terms whereof the recounting was prayed having regard to alleged rejection of 15000 votes. Furthermore although a distinction exists in terms of clauses (a) and (b) of Section 83(1) of the Act, but it should be borne in mind that pleading of material fact would include disclosure of all such information which if not rebutted would result in allowing the petition. A distinction between 'particulars' and 'full particulars' should also be borne in mind.

Had the election petitioner in his pleadings, as noticed hereinbefore, disclosed the details of the name of polling stations, counting centres, the tables, particulars of round of the counting of votes in relation whereto alleged irregularities had taken place under all the four categories and basis of material facts and particulars, the High Court, if finds, that election petitioner has made out prima facie case for scrutiny of ballot papers and recount, it may direct for recount of ballot papers in respect of the said votes only and not the entire votes. The High Court further failed to notice that in para 12 of the election petition it has merely been pointed out that irregularities in respect counting had materially affected the election and in that view of the matter. The High Court should not have directed recounting of all the votes which would amount to going beyond the said election.

CASE LAWS:

The law operating in the field is no longer resintegra Inspection of ballot papers can be ordered when in the facts and circumstances obtaining in the case, the Tribunal finds it necessary to so direct in the interest of justice. Discovery and inspection of documents with which the civil court is invested with power under the Code of Civil Procedure when trying a suit may be applied but such an order would not be granted as a matter of course having regard to the insistence upon the secrecy of the ballot papers. Such an inspection may be ordered when two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary...

[See **Ram Sevak Yadav** Vs. **Hussain Kamil Kidwai & Ors.** [1964 (6) SCR 238]

Upon considering the provisions of the Act and the Conduct of Election Rules, 1961, the Court in **Ram Sewak Yadav** (supra) held :

> "There can therefore be no doubt that at every stage in the process of scrutiny and counting of votes the

candidate or his agents have an opportunity of remaining present at the counting of votes, watching the proceedings of the Returning Officer, inspecting any rejected votes, and to demand a re-count. Therefore a candidate who seeks to challenge an election on the ground that there has been improper reception, refusal or rejection of votes at the time of counting, has ample opportunity of acquainting himself with manner in which the ballot boxes were scrutinized and opened, and the votes were counted. He has also opportunity of inspecting rejected ballot papers, and of demanding a re-count. It is in the light of the provisions of S. 83(1) which require a concise statement of material facts on which the petitioner relies and to the opportunity which a defeated candidate had at the time of counting, of watching and of claiming a recount that the application for inspection must be considered.".

In **Dr. Jagjit Singh** Vs. **Giani Kartar Singh and Others** [AIR 1966 SC 773], before a 3-Judge Bench of this Court, a contention was raised to the effect that when a Tribunal considering the evidence in the light of the allegations made by the election petitioner was satisfied that inspection should be ordered, the same should not ordinarily be reversed in appeal, this Court held :

"We are not prepared to accept this contention. The order passed by the Tribunal clearly shows that the Tribunal did not apply its mind to the question as to whether sufficient particulars had been mentioned by the appellant in his application for inspection. All that the tribunal has observed is that a *prima facie* case has been made out for examining the ballot papers; it has also referred to the fact that the appellant has in his own statement supported the contention and that the evidence led by *prima facie* justifies his prayer for inspection of ballot papers. In dealing with this question, the Tribunal should have first enquired whether the application made by the appellant satisfied the requirements of S. 83(1) of the Act; and, in our opinion, on the allegations made, there can be only one answer and that is against the appellant. We have carefully considered the allegations made by the appellant in his election petition as well as those made by him in his application for inspection and we are satisfied that the said allegations are very vague and general and the whole object of the appellant in asking for inspection was to make a fishing enquiry with a view to find out some material to support his case that respondent No. 1 had received some invalid votes and that the appellant had been denied some valid votes. Unless an application for inspection of ballot papers makes out a proper case for such inspection it would not be right for the Tribunal to open the ballot boxes and allow a party to inspect the ballot papers, and examine the validity or invalidity of the ballot papers contained, in it. If such a course is adopted, it would inevitably lead to the opening of the ballot boxes almost in every case, and that would plainly be inconsistent with the scheme of the statutory rules and with the object of keeping the ballot papers secret."

[See also **Bbhabhi** Vs. **Sheo Govind & Ors.** - (1976) 1 SCC 687]

In **Km. Shradha Devi** Vs. **Krishna Chandra Pant and Others** [(1982) 3 SCC 389 (II)], this Court observed :

"If the recount is limited to those ballot papers in respect of which there is a specific allegation of error and the correlation is established, the approach would work havoc in a parliamentary constituency where more often we find 10,000 or more votes being rejected as invalid. Law does not require that while giving proof of *prima facie* error in counting each head of error must be tested by only sample examination of some of the ballot papers which answer the error and then take into consideration only those ballot papers and not others. This is not the area of enquiry in a petition for relief of recount on the ground of miscount. True it is that 'a recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of Returning Officer' (See Halsbury's Laws of England, 4th Edn., Vol. 15, para 940). This Court has in terms held that *prima facie* proof of error complained of must be given by the election petitioner and it must further be shown that the errors are of such magnitude that the result of the election so far as it affects the returned candidate is materially affected; then recount is directed."

In **D.P. Sharma** Vs. **Comissioner and Returning Officer and Others** [(1984) Supp. SCC 157], this Court laid down the law in the following terms :

"..... It is well established that in order to obtain re-count of votes a proper foundation is required to be laid by the election petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the defeated candidate or wrong counting of votes in favour of the elected candidate which had in reality been cast in favour of the defeated candidate....."

In **Satyanarain Dudhani** Vs. **Uday Kumar Singh and Others** [(1993) Supp. (2) SCC 82], this Court laid down :

"A cryptic application claiming recount was made by the petitioner-respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any

irregularity or illegality in the counting was brought to the notice of the Returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered."

In **Ram Rati (Smt.)** Vs. **Saroj Devi and others** [(1997) 6 SCC 66], it was observed :

"....In the light of the mandatory language of Rule 76 of the Rules, it is incumbent upon a candidate or an agent, if the candidate was not present, to make an application in writing and give reasons in support thereof, while seeking recounting. If it is not done, then the tribunal or the court is not empowered to direct recounting even after adduction of evidence and consideration of the alleged irregularities in the counting....."

Yet again in **Mahant Ram Prakash Dass** Vs. **Ramesh Chandra and Others** [(1989) 9 SCC 420], this Court held :

"So far as round six, which is the last and the final round, is concerned, the charge made by the appellant in para 6 of the petition is in the following terms :—

"Round No. 6, serial No. 79/9 i.e. table No. 9, there is a cutting on the votes secured by the petitioner as 462. None of these cuttings, alterations has been authenticated by the Returning Officer or any other officer concerned at any stage."

We have seen the original Form 20 and we do not find any corrections made therein. It is only in the copies, that were typed thereafter, that discrepancies have crept in, which have been sought to be corrected and copies thereof are furnished to the appellant. On the basis of such copies no case could have been made out by the appellant. Thus there is no plea at all so far as round 6 is concerned pointing out any discrepancy or irregularity in the matter of counting. Hence we find no case is made out by the appellant in the course of the petition. In the absence of any pleading thereof, we find it difficult to accept the case put forth by the appellant that there was any irregularity in the 6th round of counting."

In **P.H. Pujar** Vs. **Kanthi Rajeshekhar Kidiyappa and Others** [(2002) 3 SCC 742], it was laid down as under :

"....The petitioner seeking recount should allege and prove that there was improper acceptance of votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the said allegations can it order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality and irregularity in counting....."

[See also **T.H. Musthaffa** Vs. **M.P. Varghese and Others** [(1999) 8 SCC 692].

In **D. Ramachandran** Vs. **R.V. Janakiraman and Others** [(1999) 3 SCC 267] this Court held :

"We do not consider it necessary to refer in detail to any part of the reasoning in the judgment; Instead, we proceed to consider the arguments advanced before us on the basis of the pleadings contained in the election petition. It is well settled that in all cases of preliminarly objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the Court has to find out whether those averments disclose a cause of action or a triable issue as such. The Court can not probe into the facts on the basis of the controversy raised in the counter."

In Mohan Rawale Vs. **Damodar Tatyaba Alias Dadasaheb and others** [(1944) 2 SCC 392] this Court observed:

"12. Further, the distinction between "material facts" and "full particulars" is one of degree. The lines of distinction are not sharp. "Material facts" are those which a party relies upon and which, if he does not prove, he fails at the time.

13. In Brace Vs. Odhams Press Ltd., (1936) 1 KB 697 : (1936) 1 All ER 287 Scott L.J. said :

"The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad." The purpose of "material particulars" is in the context of the need to give the opponent sufficient details of the charge set up against him and to give him a reasonable opportunity.

14. Halsbury refers to the function of particulars thus :

> "The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs. This function has been variously stated, namely either to limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required."

(See : Pleadings Vol. 36, para 38) :

15. In Bullen and Leake and Jacob's "Precedents of Pleadings" 1975 Edn. at p. 112 it is stated :

> "The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to save costs. The object of particulars is to 'open up' the case of the opposite party and to compel him to reveal as much as possible what is going to be proved at the trial, whereas, as Cotton L.J. has said, 'the old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial'.

16. The distinction between 'material facts' and 'particulars' which together constitute the facts to be proved - or the facta probanda - on the one hand and the evidence by which those facts are to be proved - facta probantia - on the other must be kept clearly distinguished. In Philipps Vs. Philipps, Brett, (1878) 4 QBD 127, 133 L.J. said :

> "I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. .....The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle C.J. expressed it in this way. He said that there were facts that might be called the allegata probanda, the facts which ought to be proved, and they were diffierent from the evidence which was adduced to prove those facts. And it was upon the expression of opinion of Erlie C.J. that Rule 4 [now Rule 7(1)] was drawn. The facts which ought to be stated are the material facts on which the party pleading relies."

17. Lord Denman, C.J. in William Vs. Wilcox, (1838) 8 Ad & El 331 said :

> "It is an elementary rule in pleading that, when a state of facts is relied it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegations."

18. An election petition can be rejected under Order VII Rule 11(a) CPC if it does not disclose a cause of action. Pleadings could also be struck out under Order VI Rule 16, inter alia, if they are scandalous, frivolous or vexatious. The latter two expressions meant cases where the pleadings are obviously frivolous and vexatious or obviously unsustainable."

Mr. Mani, however, has placed strong reliance on **P.K.K. Shamusdeen Vs. K.A.M. Mappillai Mohindeen and Others** [(1989) 1 SCC 526]. A two-judge Bench of this Court therein took note of **Ram Sewak Yadav** (supra) and **R. Narayan** Vs. **S. Semmalai and Others** [(1980) 2 SCC 537] wherein it was observed :

> "Thus, the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosant principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes."

Natarajan, J. having regard to the averments made in the election petition observed that neither the averments in the pleadings nor the evidence adduced were of such **compulsive nature** as could have made the Tribunal reach a prima facie satisfaction that there was adequate justification for the secrecy of ballot papers. The said decision, therefore, runs counter to the submissions of the learned counsel.

In **Jibontara Ghatowar** Vs. **Sarbananda Sonowal and Others** [(2003) 6 SCC 452], wherein a case was made out that 824 ballot papers were rejected contrary to the provisions contained in rule 63 of the Conduct of Elections rules and in violation of the law laid down by this Court in **Arun Kumar Bose** Vs. **Mohd. Furkan Ansari**

[(1984) 1 SCC 91], this Court held that the High Court was in error in refusing to direct the recounting of votes. While making the said observations, the Court relied upon an earlier decision of this in **I.A. Ahammed Kabeer** Vs. **A.A. Azeez and Others** [(2003) 5 SCC 650], wherein one of the members, Lahoti, J. was also a party noticing :

> "27. Though the inspection of ballot papers is to be allowed sparingly and the Court may refuse the prayer of the defeated candidate for inspection if, in the garb of seeking inspection, he was indulging in a roving enquiry in order to fish out materials to set aside the election, or the allegations made in support of such prayer were vague or too generalized to deserve any cognizance. Nevertheless, the power to direct inspection of ballot papers is there and ought to be exercised if, based on precise allegations of material facts, also substantiated, a case for permitting inspection is made out as is necessary to determine the issue arising for decision in the case and in the interest of justice."
>
> "28. It is true that a recount is not to be ordered merely for the asking or merely because the Court is inclined to hold a recount. In order to protect the secrecy of ballots the court would permit a recount only upon a clear case in that regard having been made out. To permit or not to permit a recount is a question involving jurisdiction of the Court. Once a recount has been allowed the Court cannot shut its eyes on the result of recount on the ground that the result of recount as found is at variance with the pleadings. Once the Court has permitted recount within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the recount which has to be given effect to."

With respect we are not in a position to endorse the views taken therein in its entirety. Unfortuantely, the decision of a larger Bench of this Court in **Jagjit Singh** (supra) had not been noticed therein. Apart from the clear legal position as laid down in several decisions, as noticed herein before, there cannot be any doubt or dispute that only because a recounting has been directed, it would be held to be sacrosanct to the effect that although in a given case the Court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor any evidence can be permitted to be adduced which is at variance with the pleadings. The Court at a later stage of the trial as also the appellate Court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading.

Furthermore, the High Court has not arrived at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting. It is well-settled that prima facie case must be made out for scrutiny and recounting of ballot papers where it is of the opinion that the errors are of such magnitude as to materially affect the election. [See **M.R. Gopalakrishan** Vs. **Thachady Prabhakaran**-1995 Supp. (2) SCC 101].

EXTENT OF PROOF

The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of recounting of votes must be of a very high standard and is required to be discharged. [See **Mahender Pratap** Vs. **Krishan Pal and others**— (2003) 1 SCC 390].

In **T. H. Mustaffa** (supra), this Court held that when the pleadings do not contain the material facts and necessary particulars, any amount of evidence would be in sufficient.

Even in the recount it was found that the returned candidate has not secured majority of the votes, the result could not have been disturbed, unless prima facie case of high degree of probability existed for recount of votes. [See **P.K.K. Shamsudden** Vs. **K.A.M. Mapillai Mohindeen**-(1989) 1 SCC 526 at 530, 531].

For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. However, there shall be no order as to costs.

However, keeping in view the fact that the election petition is pending for a long time, the High Court may consider the desirability of disposing of the same as expeditiously as possible and preferably within a period of three months from the date of receipt of a copy of this order. The records of the case, if recevied, be sent down forthwith.

New Delhi : Sd/- CJI

November 21, 2003

Sd/-

(S. B. Sinha, J.)

Sd/-

(Dr. A.R. Lakshmanan J.)

[No. 82/TN-HP/07/2000]

By Order,

TAPAS KUMAR, Secy.

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